any necessaries," and which has been adjudged violative of the due process clause of the Fifth Amendment as applied to criminal prosecutions, (*United States* v. *Cohen Grocery Co.* 255 U. S. 109,) is likewise invalid as a test of the validity of a contract for the sale of a commodity (e. g. sugar,) because in either case the standard of duty set up is so vague and indefinite as really to be no rule or standard at all. *Levy Leasing Co.* v. *Siegel*, 258 U. S. 242, distinguished. P. 237.

4. Section 5 of the Lever Act did not invest the President with general authority to fix the profit which might be taken on sales of sugar, but only with special authority, on finding that a licensee was taking an unreasonable profit, to require that such practice on the part of the licensee be discontinued and to determine what was a reasonable profit to be taken in place of the one condemned. P. 242.
5. Section 6 of the Lever Act, though prohibiting wilful hoarding and also certain acts done for the purpose of unreasonably increasing or diminishing prices, did not prohibit a selling for delivery more than 30 days in the future. P. 243.
6. The duty of a seller upon retaking goods for sale on the buyer's account is to make the resale fairly in a reasonably diligent effort to obtain a good price. P. 244.
7. Evidence, on the part of the buyer, of particular sales of like goods by others at higher prices than that obtained by the seller's resale of the goods in question, *held* rightly excluded from the jury, both because the seller was not obliged to obtain the best price possible, and because the other sales, due to circumstances disclosed, did not tend to establish a standard by which the fairness of the resale could be judged. *Id.*
8. The duty of a seller to resell goods under a vendor's lien does not arise until he takes possession under it; and the reasonable time permitted for reselling does not begin to run until then. P. 246.

Affirmed.

ERROR to a judgment of the District Court recovered by the plaintiff in an action upon two contracts for the sale of sugar, which the defendant broke by refusing to accept the sugar when delivered.

Mr. Edgar Watkins, with whom *Mr. Frederick T. Saussy*, *Mr. Mac Asbill* and *Mr. Horace Russell* were on the brief, for plaintiff in error.

Mr. Orville A. Park, with whom *Mr. J. F. Abbott* and *Mr. Ralph Crews* were on the brief, for defendant in error.

MR. JUSTICE VAN DEVANTER delivered the opinion of the Court.

This was an action to recover for the breach of two contracts for the sale by a sugar refiner to a wholesale dealer of 35,000 pounds of refined sugar—the breach consisting in the buyer's refusal to accept the sugar when delivered. The plaintiff secured a verdict and judgment in the District Court; and the defendant prosecutes this direct writ of error, a constitutional question, among others, being involved.

The contracts were alleged to have arisen out of written orders from the wholesale dealer and written acceptances by the refiner. Whether the acceptances conformed to the orders, and so resulted in contracts, was questioned by a demurrer to the petition, and also at the trial, and is the first matter presented by the assignments of error. The defendant asserts that there was a material variance in three particulars. One is that the orders contained no designation of the place from which the sugar was to be shipped, while the acceptances named New Orleans as the place. This closely approaches a mere quibble. The orders were addressed to the refiner at New Orleans and expressly gave it an option to ship from any of its refineries, one of which was at New Orleans. So, in naming that place as the one from which shipment would be made, the acceptances were in accord with the orders. Another asserted difference is that the orders fixed one price for the sugar, while the acceptances fixed another price. This is equally without substance. In the acceptances the basis on which the price was calculated was described a little differently from what it was in the orders; but there was

no difference in meaning. Besides, the price calculated on the indicated basis was set out in the price column in the orders and in the acceptances, and was the same in both. Lastly it is said that the orders gave the refiner a conditional right to supply such grades of sugar as it might have available at the time of shipment, while the acceptances omitted the words of condition and made the right absolute. This point, although having more color than the other two, must fail for reasons which will be stated.

The orders and acceptances were both prepared by the refiner—a circumstance strongly suggesting they were intended to be in accord. After the acceptances were given, both parties in several ways affirmatively treated the orders as effectively accepted. Not until this action was brought was a variance suggested. In such circumstances a court should be solicitous to find, as the parties evidently did before they became hostile, an accord between the two instruments.

The orders were given in July, 1920, and called for shipment of the sugar during September of that year. They set forth carefully the assortment of packages and grades of sugar desired, with the particular price of each, and then said:

"Barrels or equivalent at price of 22½ cents, assortment to be furnished seller by buyer before September 1, 1920, but subject to such substitutions as seller may find necessary to make. In event assortment is not furnished prompt seller reserves right to ship such grades as it has available at the time of shipment."

The acceptances set forth the assortment of packages and grades, with prices, in the same way, and then said:

"Seller reserves right to ship such grades as it has available at the time of shipment."

This provision in the acceptances is well constructed and can have but one meaning. But not so of the provision quoted from the orders. In any view it is neither gram-

matical nor rightly punctuated. It was typewritten, and probably was prepared with the idea that the assortment of packages and grades would not be embodied in the orders, but would be furnished by the buyer later on. In fact, as just shown, the assortment was set forth in the orders. But, putting this aside, the context and the sense of the whole provision indicate that the clause, "in event assortment is not furnished prompt," was intended to be a part of and to qualify what precedes it rather than what follows. If that was the meaning intended, a mistake in punctuation by the typist should not be permitted to defeat it. *Ewing* v. *Burnet*, 11 Pet. 41, 54; *Hammock* v. *Farmers' Loan and Trust Company*, 105 U. S. 77, 84. The parties evidently treated it as the true meaning when the orders and acceptances were given, for their acts already recited have no other explanation. There is ample warrant therefore for regarding the full provision as reading:

"Barrels or equivalent at price of 22½ cents. Assortment to be furnished seller by buyer before September 1, 1920, but subject to such substitutions as seller may find necessary to make in event assortment is not furnished promptly. Seller reserves right to ship such grades as it has available at the time of shipment."

In this view the orders and acceptances contained the same reservation of a right to ship available grades. A like conclusion in a like situation was reached by the Circuit Court of Appeals for the Fifth Circuit in *American Sugar Refining Co.* v. *Newnan Grocery Co.*, 284 Fed. 835.

To avoid any misapprehension, it is well to state at this point that, in fact, the refiner delivered the assortment of packages and grades specified in the orders and repeated in the acceptances.

In its answer the defendant set up two defenses expressly based on the Lever Act of August 10, 1917, c. 53, 40 Stat. 276, as amended by the Act of October 22, 1919, c. 80, 41 Stat. 297, and on orders and regulations made there-

under. One defense was to the effect that the plaintiff was not entitled to "more than one cent per pound profit on what the sugar cost, which was the *prima facie* reasonable profit fixed by the President," and in no event was entitled to "more than a reasonable profit." The other defense was to the effect that the contracts were unlawful, because they provided for delivery at a future time, more than thirty days away, and thereby "tended to increase the price of sugar and to promote the hoarding thereof." Each of these defenses was challenged by a demurrer on the grounds, first, that the facts alleged were not sufficient to constitute a defense under the Lever Act, and, secondly, that that Act was in conflict with the Fifth Amendment to the Constitution and void. The demurrers were sustained on the second ground; and the defendant assigns error on that ruling.

As the Lever Act is a long one with various provisions, we assume that the District Court's ruling was confined to certain provisions in sections 4, 5, and 6, for they are all that could have any bearing. Section 25, mentioned in the briefs, related only to coal and coke. Section 1, likewise mentioned, provided for the issue of regulations and orders to carry out other sections, but did not alter or enlarge their prohibitions or requirements.

Section 4 provided it should be "unlawful for any person wilfully . . . to make any unjust or unreasonable . . . charge in . . . dealing in or with any necessaries," or to agree with another "to exact excessive prices for any necessaries." In a series of cases, of which *United States* v. *Cohen Grocery Company*, 255 U. S. 81, and *Weeds Inc.* v. *United States*, 255 U. S. 109, are examples, this Court held that provision invalid as contravening the due process of law clause of the Fifth Amendment, among others, because it required that the transactions named should conform to a rule or standard which was so vague and indefinite that no one could know what

it was. By copious references to judicial pronouncements and proceedings the court illustrated that the terms "unjust," "unreasonable" and "excessive" as applied to prices by that provision had no commonly recognized or accepted meaning. The ground of the decision is reflected by the following excerpt from the opinion in the first case (235 U. S. 89):

"Observe that the section forbids no specific or definite act. It confines the subject-matter of the investigation which it authorizes [by court and jury after the act] to no element essentially inhering in the transaction as to which it provides. It leaves open, therefore, the widest conceivable inquiry, the scope of which no one can foresee and the result of which no one can foreshadow or adequately guard against. In fact, we see no reason to doubt the soundness of the observation of the court below, in its opinion, to the effect that, to attempt to enforce the section would be the exact equivalent of an effort to carry out a statute which in terms merely penalized and punished all acts detrimental to the public interest when unjust and unreasonable in the estimation of the court and jury."

The defendant attempts to distinguish those cases because they were criminal prosecutions. But that is not an adequate distinction. The ground or principle of the decisions was not such as to be applicable only to criminal prosecutions. It was not the criminal penalty that was held invalid, but the exaction of obedience to a rule or standard which was so vague and indefinite as really to be no rule or standard at all. Any other means of exaction, such as declaring the transaction unlawful or stripping a participant of his rights under it, was equally within the principle of those cases. They have been so construed and applied by other courts in civil proceedings. *Standard Chemicals, etc., Corporation* v. *Waugh Chemical Corporation*, 231 N. Y. 51, 54; *Dunman* v. *South Texas Lumber Co.*, 252 S. W. 274, 275. In the first of these citations, the

Court of Appeals of New York, referring to this Court's ruling in the *Cohen Grocery Company Case*, well said: "The ground on which it placed its judgment applies, and with like consequences, to civil suits as well. The prohibition was declared a nullity because too vague to be intelligible. No standard of duty had been established. . . . The variant views of judges of the District Courts were quoted as evidence of the absence of a standard. If this is the rationale of the decision, its consequences are not limited to criminal prosecutions. A prohibition so indefinite as to be unintelligible is not a prohibition by which conduct can be governed. It is not a rule at all; it is merely exhortation and entreaty."

In *Levy Leasing Company* v. *Siegel*, 258 U. S. 242, 250, a civil case arising out of the war-time rent law of the State of New York, this Court referred to the *Cohen Grocery Company Case* as "dealing with definitions of crime" and declared it "not applicable." This brief reference is now pressed on our attention, special emphasis being laid on the words "dealing with definitions of crime." We appreciate their import, but must recognize that they do not adequately reflect the matter dealt with. As already shown, it was broader than they indicate; and of course they were not intended to qualify or limit the decision. The important part of the reference was the declaration that the decision was not applicable to the case then under consideration. The inapplicability resulted from a material difference between the cases. One dealt with a federal statute prohibiting the sale of sugar at unjust, unreasonable and excessive prices, and the other with a state statute directed against reserving unjust, unreasonable and oppressive rent in the leasing of real property in a city for dwelling purposes.

The federal statute contained no provision pointing to what should be deemed a just, reasonable and not excessive price; and there was no accepted and fairly stable

commercial standard which could be regarded as impliedly taken up and adopted by the statute, as this Court construed it. While sugar has a market value, that value is subject to fluctuations which individual manufacturers and dealers can neither control nor readily foresee. The price in one trade center is affected by that in others, and in all there are material variations, even in short periods. The tendency to vary is illustrated in the present record, which shows that the price advanced in the early part of 1920, reaching 26 cents a pound in June, then remained steady for a month or two, and then declined irregularly to about eight cents.

The New York statute was not silent as to what should be deemed a just, reasonable and unoppressive reservation of rent. It recognized and named elements which would require consideration, and the state court construed it as prescribing a standard "which permitted the landlord to receive a reasonable income on his investment," valued as of the time when the rent was reserved. *Levy Leasing Company* v. *Siegel*, 194 App. Div. 482, 506; s. c. 230 N. Y. 634. So, when the case came here the question presented in this connection was whether that standard was sufficiently definite to satisfy the requirement of due process of law in the Fourteenth Amendment. This Court held that it was. Real property, particularly in a city, comes to have a recognized value, which is relatively stable and easily ascertained. It also comes to have a recognized rental value—the measure of compensation commonly asked and paid for its occupancy and use—the amount being fixed with due regard to what is just and reasonable between landlord and tenant in view of the value of the property and the outlay which the owner must make for taxes and other current charges. These are matters which in the course of business come to be fairly well settled and understood. A standard thus developed and accepted in actual practice, when made the

test of compliance with legislative commands or prohibitions, usually meets the requirement of due process of law in point of being sufficiently definite and intelligible.

The difference which we have pointed out between the two statutes and between the matters sought to be regulated by them made it obvious that the decision on the validity of one statute had no bearing on the question of the validity of the other.

As section 4 was invalid, whether taken as a civil regulation or as a criminal statute, it follows that in so far as the special defenses were based on it the demurrers were rightly sustained.

Section 5 was not dependent on section 4; nor did this Court consider its validity along with that of section 4. For present purposes, it may be described as (a) providing for the licensing of transactions in necessaries, including the manufacture, refining, distribution and sale of sugar; (b) as declaring that the President, on finding that any licensee was taking an unreasonable profit, might, by an order reciting his finding, require such licensee to discontinue taking the unreasonable profit, and might also determine what was a reasonable profit to be taken in lieu of the one found unreasonable; and (c) as providing that "in any proceedings brought in any court such order of the President shall be prima facie evidence."

It is apparent that the section did not invest the President with general authority to fix the profit which might be taken on sales of sugar, but only with special authority, on finding that a licensee was taking an unreasonable profit, to require that such practice on the part of the licensee be discontinued and to determine what was a reasonable profit to be taken in place of the one condemned.

The special defenses, while showing that the plaintiff was licensed to manufacture, refine and sell sugar, contained no allegation that the President had found that the

plaintiff in selling its sugar was taking an unreasonable profit, nor any allegation of an order by the President requiring it to discontinue such a practice. Of course, the special defenses could not derive any support from that section when there had been no action by the President under it.

One of the special defenses speaks of the President's having fixed one cent per pound as the profit which might be taken. But the reference is to an administrative regulation[1] which had no application to sales by a manufacturer or refiner to a wholesale dealer, such as are in question here. Besides, that regulation was revoked May 31, 1919, before these contracts were made. There was an administrative regulation[2] applicable to manufacturers and refiners which restricted them to taking not more than a fair and reasonable advance over cost; but this regulation was revoked January 26, 1919, before the contracts were made.

The allegation that the contracts called for a delivery more than thirty days in the future, and therefore were unlawful as tending to increase the price and promote hoarding, was of no legal effect. While section 6 prohibited wilful hoarding, and also certain acts done for the purpose of unreasonably increasing or diminishing the price, it did not prohibit a selling for delivery more than thirty days in the future. Nor did the special defenses set forth any facts which could be regarded as bringing the contracts within any prohibition of that section. Not improbably the pleader had in mind an administrative regulation[3] applicable to manufacturers and refiners which forbade making contracts of sale under which

[1] Food Administration Special License Regulations, No. XI, A–5.

[2] U. S. Food Administration Special License Regulations, No. VI, B–2 and C–2.

[3] U. S. Food Administration Special License Regulations, No. VI, A–2.